Nos. 90-1341 and 90-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. The State contends (Resp. Br. 15-20) that, from a policy perspective, there are good reasons to hold governmental facilities liable just like private entities for violations of environmental regulations. We agree that policy arguments can be made for and against the application of sovereign immunity in this context, as in others.[1] But the resolution of

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[1] Indeed, the State routinely asserts its own sovereign immunity as a defense to avoid imposition of penal sanctions,

this case is not advanced by considering the policy arguments underlying assertions of sovereign immunity, here or elsewhere. Those issues have been carefully considered by this Court, and out of that consideration has emerged the long-standing rule that waivers of sovereign immunity must be clear and unambiguous. Respondents do not contest that Congress was acquainted with that rule when it enacted the statutes at issue here. This case therefore turns on whether those statutes waive federal sovereign immunity from civil penalties in a clear and unambiguous fashion, not on whether it would have been a wise policy choice for Congress to have done so.

2. The State argues extensively against application in this case of the well-established rule that waivers of sovereign immunity must be "clear and unambiguous" and will be construed strictly in favor of the government. Resp. Br. 21-22.

Most of the cases cited by the State in support of its argument do not involve claims of sovereign immunity at all, but are instead criminal cases in which this Court rejected arguments by criminal defendants seeking to take advantage of the general principle favoring strict construction of criminal statutes. See, *e.g.*, *United States* v. *Standard Oil Co.*, 384 U.S. 224 (1966); *United States* v. *Braverman*,

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see, *e.g.*, *Drain* v. *Kosydar*, 374 N.E.2d 1253, 1256-1257 (Ohio 1978) (punitive damages not available against the State of Ohio), as well as in other circumstances, see, *e.g.*, *Ohio* v. *Madeline Marie Nursing Homes*, 694 F.2d 449, 457-462 (6th Cir. 1982) (Ohio has not waived Eleventh Amendment sovereign immunity defense in federal court); *Ohio Inns, Inc.* v. *Nye*, 542 F.2d 673, 680-681 (6th Cir. 1976) (same), cert. denied, 430 U.S. 946 (1977).

373 U.S. 405, 408 (1963); *United States* v. *Cook*, 384 U.S. 257, 263 (1966); *United States* v. *James*, 478 U.S. 597, 604 (1986); *United States* v. *Turkette*, 452 U.S. 576, 587 n.10 (1981); *United States* v. *Bramblett*, 348 U.S. 503, 510 (1955); *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 550 (1961); *Kordel* v. *United States*, 335 U.S. 345, 349 (1948). But the rule favoring strict construction of criminal statutes has an entirely different provenance from the clear statement rule that applies to waivers of sovereign immunity. In the criminal context, the strict construction principle rests largely on the need to give fair notice to individuals considering undertaking prohibited activity, a rationale that is entirely different from the considerations underlying sovereign immunity doctrine. See, *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 347-348 (1971).[2] Accordingly, the above cases provide no support for the State's argument.[3]

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[2] *Bass* also reaffirms the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 404 U.S. at 349. In this case, the State seeks, *inter alia*, to assess state civil penalties, payable to the state treasury, against the federal government. As discussed in our opening brief (see Br. 17-18), payment of such civil penalties would plainly alter "sensitive federal-state relationships," *Rewis* v. *United States*, 401 U.S. 808, 812 (1971), and should thus trigger a particularly rigorous application of the clear statement rule.

[3] Our opening brief explains (Br. 16-17) why the clear statement rule should be applied with particular care in cases involving penal measures against the federal government. We do not base that argument, however, on the principle that penal statutes generally must be strictly construed. Rather, the argument is based on the long-settled understanding,

The other cases cited by the State fail to support its argument. To be sure, there have been cases in which this Court has found that sovereign immunity had been waived because, in a particular instance, a statute enacted by Congress was found to contain the necessary "clear and unambiguous" waiver. *E.g.*, *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955). But the fact that, through application of the clear statement rule, Congress has been found in some cases to have waived sovereign immunity serves merely to reinforce the vitality of the clear statement rule. As we show in our opening brief (Br. 15-18), that rule has been reaffirmed recently and often by this Court.

Moreover, none of the cases cited by the State involved waivers with operative language remotely similar to the statutory language at issue in this case. Nor did any of the cases involve the kind of penal measures at issue here. Thus, as our opening brief explains (Br. 16-17), *Missouri Pac. R.R.* v. *Ault*, 256 U.S. 554 (1921), remains the case of this Court most closely analogous to the present one, and the rigorous enforcement of the clear statement rule in *Ault*, where a State sought to impose a civil penalty on a federal instrumentality, should inform the analysis here.

The State asserts (Resp. Br. 25) that *Ault* rested not upon a rigorous application of the clear statement principle, but instead upon the fact that the President, through his agent and acting pursuant to congressionally delegated authority, had issued an

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exemplified by *Ault*, see *infra*, that penalty provisions trigger particularly strong sovereign immunity concerns.

order precluding suit against the government for "fines, penalties and forfeitures." 256 U.S. at 562 n.1 (quoting order). Yet, the Court remarked that the President's agent, in ordering that "fines, penalties and forfeitures" were unavailable, "was careful to confine the order *to the limits set by the act*" (256 U.S. at 564 (emphasis added)), thus indicating that the order in question did not expand the waiver beyond that provided for in the statute. Indeed, the statute gave the President authority only to limit the waiver, not expand it; it provided that "carriers while under Federal control shall be subject to all laws and liabilities as common carriers, * * * except in so far as may be inconsistent * * * with any order of the President." 256 U.S. at 558. Far from resting on any action taken by the President or his agent, the Court's decision was based on its determination that "there is nothing either in the purpose or the letter [of the above quoted statutory language] to indicate that *Congress* intended to authorize suit against the Government for a penalty." *Id.* at 563 (emphasis added).[4] Because "the element of punishment clearly predominates and Congress"—not the President's agent—"has not given its consent that suits of this

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[4] Immediately following the quoted language, the Court added:

> The government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law; but it did not undertake to punish itself for any departure by the imposition upon itself of fines and penalties or to permit any other sovereignty to punish it. Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law on the part of the Government's railway employees.

256 U.S. at 563.

character be brought against the United States," the civil penalties sought could not be imposed on the federal instrumentality. 256 U.S. at 565.

3. Nor is the State correct in claiming that we advocate "a new rule of statutory construction" (Resp. Br. 20) that would "force Congress into a straitjacket of specificity when writing waivers of sovereign immunity" (Resp. Br. 24). We fully agree that "immunity waivers must be sensibly construed according to their literal language." Resp. Br. 22. In *Ault*, for example, the Court had no difficulty determining that compensatory remedies—by whatever name they are called—came within the congressional waiver (see 256 U.S. at 564-565), and in *Goodyear Atomic*, the Court found that a statute waiving sovereign immunity as to workers' compensation laws applied to *all* workers compensation laws, regardless of whether they followed the classical model in which workers are automatically entitled to benefits regardless of the employer's fault. 486 U.S. at 183-185.

The clear statement rule, however, cautions against expanding a waiver of sovereign immunity beyond the clear meaning of the language employed by Congress; in doubtful cases, this Court has instructed that the decision to expand the waiver must be made by Congress, not a court. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654, 660 (1947). The focus in each case must be on the language employed by Congress in the statute, not on policy considerations that might be thought to justify a particular waiver.

In our opening brief (Br. 39 n.34), we illustrate this point by reference to the current congressional debate over whether to enact a statute clearly waiving sovereign immunity from civil penalties under

RCRA. The State asserts that the reference to current legislation in our brief is in tension with our assertion that post-enactment legislative history carries no weight in analyzing the meaning of earlier legislation. Resp. Br. 48.

We find no such tension. Of course, the current legislative debate is of no relevance in determining the meaning the enacting Congresses attached to the statutes at issue in this case. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 26 (1983); *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983); *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980). Aside from simply informing the Court about related pending legislation, however, our reference to the recent debate is intended to illustrate the way in which the clear statement rule helps assure careful congressional consideration of the wisdom of a particular waiver. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2170 (1991). There is no evidence in the legislative history of either RCRA provision at issue in this case that the Congresses that enacted and amended those provisions gave any thought to the unique problems raised by assessing civil penalties for environmental violations against the federal government. As a result of the clear statement rule, however, Congress is now focusing its attention on legislation that would clearly and unambiguously waive federal sovereign immunity from civil penalties for hazardous waste violations, and its action on that legislation will be informed by consideration of precisely those issues. See H.R. Rep. No. 111, 102d Cong., 1st Sess. 25-29 (1991) (dissenting view), 30-32 (additional views).

4. a. The State advances three arguments in support of its position that the federal facilities provision of the CWA, Section 313(a), 33 U.S.C. 1323(a), waives federal sovereign immunity from civil penalties.

First, the State asserts that the provision employs the term "sanction," which has been defined as including a "penalty." Resp. Br. 27. We have no quarrel with the dictionary definitions of "sanction" quoted by the State. However, as our opening brief explains (Br. 19-21), the provision at issue inextricably couples "sanction" with "process," by waiving sovereign immunity as to "all * * * requirements, administrative authority, *and* process and sanctions." CWA § 313(a), 33 U.S.C. 1323(a) (emphasis added). The provision thus waives sovereign immunity as to "process and sanctions"—*i.e.*, prospective, injunctive relief and sanctions to enforce compliance with such relief. The S[illegible]ers no explanation for the use of the term "ar[illegible]et off the unified expression "process and sanctions" from the two other items on the list and, indeed, under the State's reading, the use of that term would render the provision ungrammatical. In short, although the term "sanctions" may indeed be used to refer generally to penal measures, the grammar of the provision at issue precludes that meaning.

Second, the State asserts (Resp. Br. 28-29) that Congress could have intended the terms "process and sanction" to refer to penal measures (presumably both civil and criminal), in addition to injunctive relief and sanctions to enforce such relief. Although the State cites the current edition of *Black's Law Dictionary* in support of that assertion, that source in fact supports our interpretation of the statute. Black's Law Dictionary generally defines "process" as "any

means used by a court to acquire or exercise its jurisdiction over a person or over specific property" or the "[m]eans whereby a court compels appearance of defendant before it or a compliance with its demands." *Black's Law Dictionary* 1205 (6th ed. 1990).[5] After referring to an older use of the term, the passage states that "[t]he word 'process,' however, as now commonly understood, refers to a summons, or, summons and complaint, and, less commonly, to a writ." *Ibid.* In accordance with that definition, the term "process and sanction" refers to the means whereby court exercises its jurisdiction and the penalty for those who disregard exercises of that jurisdiction—*i.e.*, in this context, injunctive relief and sanctions necessary to enforce compliance with such relief.

The State's definition of "process" refers to a different part of the dictionary definition, which includes "all the acts of a court from the beginning to the end of its proceedings." Resp. Br. 28. That phrase, however, is a part of the following passage, which purports to define the term "judicial process":

> *Judicial process.* In a wide sense, this term may include all the acts of a court from the beginning to the end of its proceedings in a given cause; but more specifically it means the writ, summons, mandate, or other process which is used to inform the defendant of the institution of proceedings against him and to compel his appearance, in either civil or criminal cases.

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[5] Similarly, the only case cited by the State (Resp. Br. 28), *Girardier* v. *Webster College*, 563 F.2d 1267, 1272 (8th Cir. 1977), cites an older edition of *Black's Law Dictionary* for the proposition that "process" refers to "the means by which a court compels the appearance of a defendant before it or by which the court compels a compliance with its demands."

Black's Law Dictionary at 1205. To begin with, the statute uses the term "process" and the phrase "process and sanction," not the term "judicial process" defined in the above passage. Accordingly, the relevance of the above definition is doubtful. It is all the more doubtful that, in the context of a waiver of sovereign immunity, it is appropriate—or even permissible—to rely on the "wide sense" of a term, rather than its more specific use. CWA § 313(a), 33 U.S.C. 1323(a).

Even if the above definition were of relevance to the issue in this case, it does not support the State's argument. We agree that, in the terms of CWA Section 313(a), federal agencies are "subject to" and must "comply with" the "acts of a court from the beginning to the end of its proceedings" in a CWA case. If the United States does not comply with such acts, it is amenable to "sanctions" that may be imposed by a court to enforce its process. The question in this case, however, is whether it is lawful for a court to impose civil penalties on the United States; that question is not resolved merely by stating, as the State does (Resp. Br. 28), that a court might choose—in our view, improperly—to attempt to use its process to assess a civil penalty for violation of the environmental statutes at issue in this case.

Finally, the State asserts that our interpretation of the statute "contradicts the meaning ascribed by Congress to the same words in the Clean Air Act waiver upon which 33 U.S.C. 1323 is based." Resp. Br. 28. To begin with, the State's assumption that legislative history can establish a waiver of federal sovereign immunity where the terms of the relevant statute do not is mistaken. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Irwin* v. *Veterans Admin.*,

111 S. Ct. 453, 457 (1990). Resort to legislative history is appropriate only when congressional intent is *not* "unequivocally expressed" in the statute. See, *e.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985). It logically follows that legislative history cannot suffice to establish a waiver of sovereign immunity or to broaden the scope of the waiver specified in the statutory text. Cf. *Hoffman* v. *Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 104 (1989).

The legislative history of the CWA does not, in any event, support the State's argument. The only reference to civil penalties cited by the State is a single sentence in a House committee report on an amendment to the Clean Air Act's federal facilities provision, passed a few months prior to the amendment to the CWA federal facilities provision at issue in this case. H.R. Rep. No. 294, 95th Cong., 1st Sess. 200 (1977). Although Congress intended generally "to conform" the CWA provision "with a comparable provision in the Clean Air Act," H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977), the language of the Clean Air Act amendment was not adopted intact, as we noted in our opening brief. See Br. 23. In any event, the fact that a committee stated in general terms, without elaboration, that it intended "to conform" the *language* of the CWA provision to that of the Clean Air Act amendment does not lead to the conclusion that the committee, much less Congress, intended to adopt the legislative history of the Clean Air Act provision *in toto* for use in interpreting the corresponding CWA provision.

b. The CWA federal facilities provision contains a proviso that "the United States shall be liable only

for those civil penalties arising under Federal law." CWA § 313(a), 33 U.S.C. 1323(a). As our opening brief explains (Br. 24-30), that proviso uses language ("arising under Federal law") with a well-recognized legal meaning, most familiar from the use of the term "arising under the * * * laws * * * of the United States" in the basic statute granting federal question jurisdiction to the district courts, 28 U.S.C. 1331. We also point out that, under any of the interpretations that have been given to that language, the state civil penalties at issue in this case cannot be said to "aris[e] under Federal law" and, accordingly, cannot be assessed against the United States. See Br. 25-26 (citing cases). In particular, this Court's decision in *Gully* v. *First National Bank*, 299 U.S. 109 (1936), makes clear that the fact that a state statute has received federal approval—even where, as is not the case here, such approval would be necessary to render the state law effective—does not convert it into a statute that arises under federal law.

The State's primary response to this argument is to insist that the dictionary meaning of "arising," not the established legal meaning of the term "arising under," should govern this case because "[t]he Clean Water Act waiver is the product of its own specific purpose and history," while "the interpretations of 28 U.S.C. 1331 are the result of that statute's distinct purpose and history." Resp. Br. 34. The State's argument is unpersuasive.

First, we do not understand how the dictionary definition of the term "arise" as to "originate" or "come into being" (see Resp. Br. 29) supports the State's argument; to the contrary, that definition serves to make our point. The State does not—and cannot—dispute that liability for civil penalties under Ohio Rev. Code § 6111.09 "originated" or "came into be-

ing" when the Ohio state legislature enacted that statute, not when the United States Congress enacted or amended the CWA. Prior to the Ohio legislature's enactment, there was no such liability; when Section 6111.09 was enacted, entities began to be subject to the civil penalties specified in that section. Accordingly, even under the dictionary definition espoused by the State, civil penalties assessed under Ohio Rev. Code § 6111.09 "arise under" state, not federal, law.[6]

Second, whatever may be the dictionary definitions of "arise," the State does not dispute that the phrase "arising under"—the precise phrase used in CWA Section 313(a)—had a well-recognized legal meaning at the time Congress enacted that statute in its present form. As our opening brief explains, under that well-recognized meaning, the civil penalties the State seeks to impose under Ohio Rev. Code § 6111.09 do not "aris[e] under Federal law."

International Ass'n of Machinists v. *Central Airlines*, 372 U.S. 682 (1963), the only case cited by the State, is not to the contrary. *Machinists* involved a provision of the Railway Labor Act requiring creation of "system boards" to address labor disputes in the airline industry. See 45 U.S.C. 184 (1958). Petitioner union and respondent airline had contracted to establish such a board, see 372 U.S. at 683, but

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[6] The State points out that Ohio law borrows federal standards for assessment of civil penalties (Resp. Br. 32) and that EPA approved the Ohio permit program (Resp. Br. 33). Those considerations suggest that the state legislature's *motivation* for enacting the state civil penalties provision may have been to create a state permit program that would supplant the federal program in accordance with CWA Section 402, 33 U.S.C. 1342. They do not show, or even suggest, that Ohio Rev. Code § 6111.09 "arose"—or "originated" or "came into being"—under federal law.

the union brought an action in federal district court alleging that the airline had not complied with an award of the board. This Court held that the case did not "present a serious question of the scope of the arising-under provision of § 1331 or [28 U.S.C. 1337]." 372 U.S. at 696. Rather, the obligation of the airline to comply with the system board's award plainly arose under the federal statute requiring that such boards be created and making their awards "final and binding." See 372 U.S. at 688. Therefore the case came well within the grant of jurisdiction in Section 1331.

This case raises an entirely different issue from *Machinists*. As the State itself notes (Resp. Br. 34), this Court observed that the contract in *Machinists* depended on the federal statute for its "power and authority." 372 U.S. at 692. By contrast, as we explain in our opening brief (Br. 26), the state civil penalties at issue here apply *ex proprio vigore*, entirely independent of federal law. The *Machinists* decision rested on the proposition that parties who enter into a contract concerning performance of an obligation under federal law do not thereby eliminate the federal component of a subsequent dispute concerning the performance of that obligation. This case involves no contract, and the obligation at issue is an obligation to pay civil penalties whose nature and incidence are determined entirely by state law. Because the State is attempting to enforce that obligation entirely under the "power and authority" of state law, *Machinists* does not support the State's argument that the obligation nonetheless arises under federal law.

Finally, the State is mistaken in asserting (Resp. Br. 34-35) that the law surrounding the interpretation of "arising under" in 28 U.S.C. 1331 may be

ignored because the CWA "arising under" proviso and 28 U.S.C. 1331 have distinct purposes. It is well-settled that, where a statute uses a term that has an established legal meaning, it should be presumed that Congress intended that meaning when it enacted the statute. See, *e.g.*, *McDermott Int'l, Inc.* v. *Wilander*, 111 S. Ct. 807, 811 (1991); *Bradley* v. *United States*, 410 U.S. 605, 609 (1973); *United States* v. *Merriam*, 263 U.S. 179, 187 (1923); *Henry* v. *United States*, 251 U.S. 393, 395 (1920); *The Abbotsford*, 98 U.S. 440, 444 (1878). Moreover, the purposes of Section 1331 and the CWA "arising under Federal law" proviso are not indeed so very different. In both statutes, Congress intended to draw a line to advance a particular federal interest—in the case of Section 1331, ensuring that federal causes of action need not be adjudicated in the courts of a subordinate sovereign and in the case of the CWA provision at issue here, ensuring that the federal government is not subject to civil penalties payable to a subordinate sovereign. In both cases, Congress chose to draw that line on the basis of whether the legal issues had their source in federal or state law.[7]

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[7] The State asserts that the purpose of CWA Section 313(a) was to "encourage compliance with comprehensive, federally approved water pollution programs while shielding federal agencies from unauthorized penalties." Resp. Br. 34-35. We agree with that general statement, but submit that the penalties that Congress found "unauthorized" were penalties such as those arising under state law, in this case Ohio Rev. Code § 6111.09. The State also asserts that Congress's objective "to enforce federal facility compliance with the [CWA]" cannot be "accomplished without the penalty deterrent." Resp. Br. 35. Of course, the issue of how far Congress's objectives may be achieved with or without civil penalties is entrusted to Congress, not the courts. And, in any event, what is at issue with respect to the "arising under" proviso is not *all*

5. With respect to the two citizen suit provisions at issue in this case—CWA § 505(a), 33 U.S.C. 1365(a), and RCRA § 7002(a), 42 U.S.C. 6972(a) —our opening brief points out (Br. 31-34, 40-44) that those provisions authorize district courts to assess only civil penalties that are "appropriate" under the respective civil penalties provisions, which make quite clear that it is never "appropriate" to assess a civil penalty against the United States.

In response, the State asserts that the term "appropriate" was intended to refer "to the well documented judicial discretion to adjust the size of a civil penalty depending on the facts and equities." Resp. Br. 37. We do not disagree with that assertion, as far as it goes. As we have explained (Br. 32-33, 41-42), the term "appropriate" makes clear that the incidents of civil penalties and the determination of when they are to be assessed must be made in accordance with the respective civil penalties provisions. Thus, while the term "appropriate" no doubt was intended to refer to the discretion of a court to determine the size of a civil penalty, there is no reason to believe that it was not also intended to refer to the statutory limits or the circumstances in which such a penalty ought to be assessed, and—most important, for present purposes—the entities against whom it may be assessed. An attempt to assess a civil penalty that is too big, unjustified by the defendant's conduct, or levied against an entity not subject to civil penalties would not be "appropriate" under the civil penalties provisions of the CWA and RCRA. And, because the United States does not come within the class of "persons" against whom those provisions permit the

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civil penalties assessed against the federal government, but only those arising under state law.

assessment of civil penalties, it is never "appropriate" to assess a civil penalty against the United States.

With respect to the RCRA citizen suit provision, the State places substantial reliance (Resp. Br. 40) on a single sentence in a Senate committee report accompanying the 1983 amendements to RCRA, in which the committee asserted that "[e]ither a noncomplying agency [or] the Administrator, if he fails to act, are subject to the citizen suit and penalty provisions of Section 7002." S. Rep. No. 284, 98th Cong., 1st Sess. 45 (1983). Although the State correctly notes (Resp. Br. 40) that the passage was included under the general heading "Federal Facilities," the fact remains that the cited language appears in the second half of a paragraph that, like the balance of that portion of the report, discusses newly enacted provisions requiring the inspection and inventory of federal facilities that handle or generate hazardous wastes. It is not included in the portion of the report discussing the amendment to the civil penalties provision, which contains the statutory language at issue here. Moreover, the committee report is best understood simply to inform Congress that remedies, *if any*, for a failure to comply with the inspection and inventory requirements, are to be found in the citizen suit provision. Indeed, if the language were read—as the State suggests—to indicate Congress's understanding that federal facilities and the Administrator of EPA are subject to civil penalties, it would be plainly mistaken; no provision of RCRA can reasonably be read to authorize civil penalties against the Administrator of EPA.

6. Although the specific statutory language must govern the analysis in this case, we have suggested in our opening brief (Br. 12-13) that a general prin-

ciple emerges from the text of both of the statutes at issue here: that Congress has waived the federal government's immunity from prospective, injunctive relief and sanctions to enforce that relief, but has not waived federal sovereign immunity from retrospective, or penal, forms of relief.[8] In response, the State argues with respect to the RCRA federal facilities provision (Resp. Br. 43) that the distinction between prospective and retrospective relief is in some way inconsistent with the explicit statutory language mandating that the United States comply with reporting requirements. See CWA § 313(a), 33 U.S.C. 1323(a); RCRA § 6001, 42 U.S.C. 6961.

We agree that the United States is subject to reporting requirements, but fail to see the inconsistency suggested by the State. For we have not urged that the statute distinguishes between prospective and retrospective *requirements*, but rather between prospective and retrospective forms of *relief*; reporting requirements mandated by statute or regulatory action are obviously in the former category. Thus, when a court determines that a federal facility has violated water pollution or hazardous waste regulatory measures (such as reporting requirements), it may order the federal government to undertake appropriate remedial actions to bring the federal facility into compliance and it may enforce that order

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[8] The general distinction between prospective and retrospective relief is not unfamiliar in the context of sovereign immunity doctrine. Compare *Edelman* v. *Jordan*, 415 U.S. 651, 664-671 (1974) (retrospective relief not permissible against States under the Eleventh Amendment), with *Quern* v. *Jordan*, 440 U.S. 332, 347-349 (1979) (prospective relief permissible), and *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978) (same).

with sanctions if necessary (prospective relief). It may not, however, simply assess a penalty (retrospective relief) for past failure to comply.

It is true, but immaterial, that permitted prospective relief may, in a given case, impose a greater financial burden on the government than would the prohibited retrospective relief. Nat'l Governors' Ass'n, et al. Amici Br. 20. The fundamental distinction between the two forms of relief nonetheless remains. It is the distinction between ordering that the government comply with legally binding obligations—which may necessitate the expenditure of government funds—and ordering that the government (additionally) disburse funds as a penalty for past noncompliance. See, *e.g.*, *Papasan* v. *Allain*, 478 U.S. 265, 278-282 (1986); *Edelman*, 415 U.S. at 667-668.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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